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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

SCINDIA STEAM NAVIGATION COMPANY, LTD.
and
THE SHIPPING CORPORATION OF INDIA, LTD.,
Petitioners,
vs.
MICHAEL RIGGS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a vessel's duty of care owed to a longshoreman under Section 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), extend to unsafe conditions existing in a cargo stow, including those which are open and obvious to the longshoreman and his stevedore-employer?

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PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioners, SCINDIA STEAM NAVIGATION COMPANY, LTD. and THE SHIPPING CORPORATION OF INDIA, LTD. ("petitioners")[1], respectfully pray that a writ of certiorari issue to review the order of the United States Court of

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[1]Pursuant to United States Supreme Court Rule 29.1, petitioner SCINDIA STEAM NAVIGATION COMPANY, LTD. reports one subsidiary corporation, Eastern Bunkerers, Ltd., and no parent corporations. Petitioner THE SHIPPING CORPORATION OF INDIA, LTD. has no parent or subsidiary corporations.

Appeals for the Ninth Circuit entered on November 8, 1993 reversing the grant of a summary judgment in favor of petitioners and that this matter be consolidated with matter No. 93-670, *Howlett v. Birkdale Shipping Co., S.A.*, which involves virtually the same issue.

There is a clear conflict of authority among various circuit courts of appeals regarding the scope of a vessel's[2] liability for injuries sustained by a longshoreman during discharge operations aboard the vessel. The Third Circuit maintains the standard advocated by petitioners in the present case: except in very limited circumstances, the vessel owes a duty of care to off-loading longshoremen only for dangers presented by the ship and its equipment, not the cargo, while the stevedore bears the burden for dangers posed by the cargo. The Fifth and Ninth Circuits, however, have held precisely the opposite, imposing on the vessel a duty to protect off-loading longshoremen from dangers posed by the cargo and created by the loading stevedore.

This conflict among the courts of appeals underlies a case already accepted for review by this Court, *Howlett v. Birkdale Shipping Co., S.A.*, No. 93-670, which asks whether the vessel may be held liable for concealed dangers in the cargo. The present case poses the same question for review, except that it is directed to open and obvious dangers in the cargo. In fact, the issue in the instant case brings into clearer focus than does *Howlett* the conflict among the circuits since, with the instant decision, the Ninth Circuit has announced that liability may be imposed for obvious as well as concealed cargo dangers and, thus, has placed itself in direct contravention of the opposite rule annunciated by the Third Circuit.

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[2]Under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 900, *et seq.* (the "LHWCA"), "vessel" is defined to encompass both the shipowner and the charterer of the vessel. 33 U.S.C. § 902(21).

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit reversing the decision of the United States District Court for the Central District of California is officially reported at 8 F.3d 1442 (1993) and is reproduced in the appendix beginning at page 1a.

The order of the United States District Court for the Central District of California granting summary judgment against respondent is not officially reported and is reproduced in the appendix beginning at page 9a.

JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit was entered on November 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 5(b) of the LHWCA, is reproduced as follows:

> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreement or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided by this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. § 905(b).

STATEMENT OF THE CASE

This case arises from injuries sustained by the respondent, MICHAEL RIGGS ("respondent"), a longshoreman, while unloading the vessel M/V JALAGOPAL in 1989. Respondent sued petitioners, the owner and time charterer of the vessel, after he slipped and fell on a cargo of steel pipe. The cargo had been loaded by a foreign stevedore. The cargo was in disarray in the hold at the time the discharge operation began. Whatever danger the condition of the cargo posed was at all times open and obvious to the off-loading stevedore and to its employees, including respondent. Respondent was further aware that at least one other longshoreman had fallen in the cargo hold prior to respondent's accident. No member of the ship's crew was present in the hold once discharge operations began.

Respondent filed suit against the vessel in the district court under 33 U.S.C. § 905(b) and 28 U.S.C. § 1332. The district court granted the vessel's motion for summary judgment, ruling that a vessel owes no duty to an off-loading longshoreman for hazards in the cargo which are open and obvious. The Ninth Circuit Court of Appeals reversed.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. As This Court Recognized By Recently Granting The Petition for Certiorari In *Howlett v. Birkdale Shipping Co., S.A.*, No. 93-670, There Is A Conflict Among The Circuits As To Whether A Vessel Owes A Duty To An Off-loading Longshoreman For Hazards In The Cargo Stow Caused By The Loading Stevedore.

A. There Is A Split Of Authority Between The Fifth, Ninth, And Third Circuit Courts Of Appeals.

1. In the Fifth and Ninth Circuits, A Vessel Owes A Duty Of Care To An Off-loading Longshoreman For Hazards In The Cargo Stow Caused By the Loading Stevedore.

The scope of a vessel's duties to longshoremen engaged in cargo operations aboard the vessel was delineated by this Court in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S. Ct. 1614, 68 L.Ed. 2d 1 (1981). In that opinion, the vessel's duties were said to consist, in part, of the following:

> The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden dangers which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman.

Id. at 167, 68 L.Ed. 2d at 12.

Three months after the decision in *Scindia*, the Ninth Circuit Court of Appeals decided *Turner v. Japan Lines, Inc.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967, 103 S. Ct. 294, 74 L.Ed. 2d 278 (1982). The issue presented in *Turner* was whether a vessel owed a duty to protect a discharging longshoreman from concealed dangers in the cargo created by a foreign stevedore in improperly stowing the cargo. Reasoning that the vessel was in a better position than the stevedore-employer to protect the off-loading longshoreman by choosing and properly supervising a reliable loading stevedore, the Ninth Circuit stated:

> We hold, therefore, that the vessel had a duty to protect the plaintiff [off-loading longshoreman] against concealed dangers created by a foreign stevedore which the vessel could, in the exercise of reasonable care, have corrected or warned of.

Id. at 1304.

A few months later, the Fifth Circuit considered the scope of a vessel's duty to an off-loading longshoreman in the context of an open and obvious danger in the cargo. In *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110, 116 (5th Cir. 1981), the Fifth Circuit held that the vessel could be liable for obvious defects in the cargo, regardless of the stevedore's awareness of the hazard, if the vessel's own negligence in stowing the cargo contributed to the

hazard. The Fifth Circuit reaffirmed its holding in *Lemon* in *Woods v. Sammisa Co.*, 873 F.2d 842 (5th Cir. 1989), stating:

> [In *Lemon*,] we extended *Scindia's* imposition of a duty on the shipowner to correct, as to all dangerous conditions including those relating to cargo, equipment-related and other defects of which it has actual knowledge and which it actually knows the stevedore does not intend to correct.

Id. at 848-49.

In the instant case, the Ninth Circuit revisited and extended its holding in *Turner* to include open and obvious dangers in the cargo stow as well as concealed dangers. In doing so, the Ninth Circuit recognized the conflict surrounding this issue:

> [W]e hold that a vessel has a duty to take the necessary steps to protect longshoreworkers against open and obvious cargo defects and not just concealed ones. Our holding is in accord with the law of the Fifth Circuit on this question. . . . The Third Circuit takes the position that the turnover duty of safe condition does not encompass any cargo-stow defects, whether hidden or obvious. . . . We join the Fifth Circuit in holding that the duty of safe turnover encompasses open and obvious, as well as concealed, cargo hazards.

Id. at 1448.[3] *See also Gill v. Hango Ship-owners/AB*, 682 F.2d 1070 (4th Cir. 1982).

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[3]Included in the appendix beginning at page 14a is an unpublished memorandum issued by the Ninth Circuit a year prior to the decision in the instant case. *Godfrey v. M/V Baronia; Hyundai Merchant Marine Corp.*, No. 91-55146. In the memorandum, a panel of the Ninth Circuit, consisting of different members than either the instant case or the *Turner* case, held that a shipowner is not liable for an open and obvious condition of the cargo. Rather, the *Godfrey* court explicitly ruled that *Turner* was limited to cases involving concealed dangers in the cargo. Although the memorandum opinion is, according to the rules of the Ninth Circuit, not suitable for citation as precedent, it is offered here solely to illustrate that even within the Ninth Circuit disparate results are being reached in similar cases.

The Fifth and Ninth Circuits, therefore, unequivocally impose upon a vessel the duty to protect an off-loading longshoreman from both concealed and obvious hazards in the cargo caused by the loading stevedore.

2. In The Third Circuit, A Vessel Does Not Owe A Duty Of Care To An Off-loading Longshoreman For Hazards, Either Concealed Or Obvious, In The Cargo Stow Caused By The Loading Stevedore.

In *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), the Third Circuit Court of Appeals affirmed a decision rejecting the notion that the vessel may have liability to an injured off-loading longshoreman for hazards in the cargo stow caused by an independent loading stevedore. In its analysis, the Third Circuit emphasized that under *Scindia*, a vessel may be charged with only limited duties to a longshoreman, and noted:

> [W]ith respect to cargo not loaded by or under the active supervision of the vessel, the Court [in *Scindia*] explained that the vessel could rely on the expertise of the stevedore. *Id.* at 170-71, 101 S. Ct. at 1623-24; *see, e.g., Kakavas*, 789 F.2d at 118 ("[t]he basic theme of the *Scindia* opinion is the extensive reliance that a ship owner may justifiably place on an independent contractor").
>
> The stevedore, in turn, who is in the best position to avoid accidents during the cargo operation has a statutory duty to provide for the safety of longshoremen under 33 U.S.C. Section 941 (1982) and warrants to the vessel that he will perform competently. *Scindia*, 451 U.S. at 170-71, 101 S. Ct. at 1623-24.

Id. at 493.

Applying this analysis, the *Derr* court expressly held that the vessel had no duty to supervise the loading of cargo or to inspect the stowage of the cargo before turning the vessel and the cargo over to a different stevedore for discharge operations. *Id.* at 493. In reaching this conclusion, the *Derr* court specifically disagreed with the Ninth Circuit's opinion in *Turner*, saying: "We cannot accept the *Turner* analysis. As *Scindia* makes clear, the 1972

amendments are grounded in the belief that stevedores are primarily responsible for the stowage of cargo. . . ." *Id.* at 494.

Likewise, the court in *Derr* limited the vessel's duty to provide a safe work space and its duty to intervene in cargo operations to matters related to "the ship, its equipment, and gear," not to the cargo or its stowage. *Id.* at 495-96. Finally, the *Derr* court also held that the vessel had no duty to warn of the improper stowage. *Id.* at 496.

The Third Circuit, therefore, is in direct conflict with the Fifth and Ninth Circuits in holding that a vessel owes no duty to an off-loading longshoreman for defects — concealed or obvious — in cargo stowage.

B. The Same Conflict Among The Circuits Underlies The Petition For Certiorari Recently Granted In *Howlett v. Birkdale Shipping Co., S.A.*, No. 93-670.

This Court has already granted certiorari in *Howlett v. Birkdale Shipping Co., S.A.*, No. 93-670, which raises the same conflict presented in the present petition. In *Howlett*, certiorari was granted to determine the following issue:

> Does not the shipowner's duty of care owed to a longshoreman under Section 5(b) of the Longshore and Harbor Workers' Compensation Act extend to unsafe conditions existing in a cargo stow of which the shipowner knows or has reason to know, and which are unknown to the longshoreman and his stevedore employer, are not open and obvious, and would not normally be anticipated?

No. 93-670.

The Third Circuit in *Howlett* decided the case according to the standard in *Derr*, which declined to find a duty on the part of the vessel for any defects in the cargo stow, irrespective of whether they are concealed or obvious. The petitioner in *Howlett*, of course, urged the Court to adopt the view of the Ninth Circuit in *Turner*, which would hold the vessel liable for a longshoring injury caused by a concealed defect. Indeed, once the decision in the present case was published extending the holding of *Turner* to obvious hazards, petitioner supplemented his papers to focus

attention on the clear conflict between the holding in *Derr* and the holding in the instant case. The conflict between the circuits underlying the *Howlett* petition is made even more explicit in the present petition by virtue of the Ninth Circuit's holding below.

II. The Ninth Circuit's Holding In the Instant Case And In Its Precursor, *Turner*, Contravene The 1972 Amendments To The Longshore And Harbor Workers' Compensation Act And This Court's Decision in *Scindia*.

Prior to 1972, longshoring personal injury suits were marked by the following characteristic cycle of litigation: The longshoreman sued the vessel which could be strictly liable for any condition aboard the vessel which injured the longshoreman under the doctrine of unseaworthiness. The vessel, in turn, sued the longshoreman's employer, the stevedore, for a breach of its warranty of workmanlike performance. The stevedore, in the meantime, imposed a lien against any award the longshoreman received against the vessel as repayment for its statutory compensation to its injured employee.

Congress drastically altered this circuitous scheme with the 1972 amendments to the LHWCA. The amendments increased the level of compensation which the stevedore had to pay to the longshoreman, precluded a longshoreman's suit against the stevedore-employer, did away with the vessel's strict liability under the unseaworthiness doctrine, and abrogated the vessel's right of contribution from the stevedore. Since that time, a vessel has been held liable to a longshoreman only for its own negligence in specifically enumerated situations.[4]

In 1981, this Court established the standard of care to be employed to determine vessel liability under this statutory scheme. In *Scindia*, 451 U.S. 156, this Court dispelled the notion that a vessel owes a duty to inspect or supervise the cargo

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[4]Petitioners recognize, of course, that under *Edmonds v. Campagnie Generale Transatlantique*, 443 U.S. 256, 99 S. Ct. 2753, 61 L.Ed. 2d 521 (1979), a vessel may be liable to a longshoreman for the stevedore-employer's negligence unless the stevedore-employer is found to be the sole cause of the injury.

operations of an independent stevedore: "The shipowner, within limits, is entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations." *Id.* at 172. The vessel owner, it was concluded, had no duty "to discover and correct dangerous conditions that develop during the loading or unloading process." *Id.* at 169. The imposition of such a duty, the Court reasoned:

> [W]ould repeatedly result in holding the shipowner solely liable for conditions that are attributable to the stevedore, rather than the ship.... "Creation of a shipowner's duty to oversee the stevedore's activity and insure the safety of longshoremen would... saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending Section 905(b)." *Id.* at 169, *quoting Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1249-50 n.35 (3d Cir. 1977).

In the present case, the Ninth Circuit has drawn a distinction between the duties owed by the vessel to the loading longshoreman as opposed to the off-loading longshoreman. Under this scheme, the owner is excused by *Scindia* from supervising the work of the employer-stevedore, but is charged with a duty to supervise the work of the loading stevedore. However, as was astutely recognized by the lower court in *Robertson v. Tokai Shosen K.K.*, 655 F. Supp. 152 (E.D. Pa. 1987) (a companion case to *Howlett*, No. 93-670):

> Now, if one may not find the vessel liable for wrongs of the off-loading stevedore under the Act, then one can no more find the vessel liable for wrongs of the on-loading stevedore. ... If I were to adopt the position ably advocated by plaintiff's counsel, I would eviscerate *Scindia* and the Act. Otherwise, while the vessel would not be required to supervise and inspect each stevedoring operation... it would be held to such a requirement at each subsequent port which encountered the condition of the stow. This makes no sense, and would render the principle of fault-based liability of the vessel a nullity.

Id. at 154-55.

One of the goals of the 1972 amendments to the LHWCA was to put an end to a vessel's strict liability for unseaworthiness. Under *Scindia*, that goal was effectuated by imposing, except under strictly limited circumstances, duties for the ship and its equipment on the vessel and duties for the cargo and its handling on the stevedore. As the law presently stands in the Ninth Circuit, that goal is defeated by the requirement that the vessel now effectively oversee all cargo operations.

CONCLUSION

For these reasons, petitioners respectfully request that a writ of certiorari issue to review the judgment below and that this matter be considered in consolidation with matter No. 93-670, *Howlett v. Birkdale Shipping Co., S.A.*

Dated: February 7, 1994

Respectfully submitted,

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MICHAEL RIGGS, *Plaintiff-Appellant,*

v.

SCINDIA STEAM NAVIGATION COMPANY and the Shipping Corporation of India, Defendants-Appellees.

No. 92-55139.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 15, 1993
Decided Nov. 8, 1993

Longshoreman injured while unloading cargo brought action under Longshore and Harbor Workers' Compensation Act (LHWCA) against vessel owner and time charterer, alleging negligent failure to provide reasonably safe place to work. The United States District Court for the Central District of California, Harry L. Hupp, J., granted summary judgment for defendants, and longshoreman appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that longshoreworker who is injured on board vessel while off-loading cargo stowed in open and obviously hazardous manner by foreign stevedores may maintain negligence action under LHWCA against vessel.

Reversed and remanded.

Rymer, Circuit Judge, filed concurring opinion.

1. Shipping — 84(6)

Provision of Longshore and Harbor Workers' Compensation Act under which longshoreworkers retain statutory action against vessels for negligence does not prohibit vessel from obtaining recovery against foreign on-loading stevedore and does not allocate liability between those two entities. Longshore and Harbor Workers' Compensation Act, § 5(b), 33 U.S.C.A. § 905(b).

2. Shipping — 84(3.2)

For purpose of determining liability to longshoreworker under Longshore and Harbor Workers' Compensation Act (LHWCA), vessel's turn over duty of safe condition extends to concealed cargo hazards created by foreign on-loading stevedores. Long-

shore and Harbor Workers' Compensation Act, § 5(b), 33 U.S.C.A. § 905(b).

3. Shipping — 84(3.2)

For purpose of determining vessel's liability in negligence to longshoreworker under Longshore and Harbor Workers' compensation Act (LHWCA), vessel is not relieved as matter of law from its duty to turn over safe cargo stow merely because hazardous condition is open and obvious. Longshore and Harbor Workers' Compensation Act, § 5(b), 33 U.S.C.A. § 905(b).

4. Shipping — 84(5)

Neither assumption of risk nor contributory negligence is defense under Longshore and Harbor Workers' Compensation Act (LHWCA). Longshore and Harbor Workers' Compensation Act. § 5(b), 33 U.S.C.A. § 905(b).

5. Shipping — 84(5)

Vessel may not defend negligence suit brought against it by longshoreworker under Longshore and Harbor Workers' Compensation Act (LHWCA) on ground that injured longshoreworker should have refused to continue working in face of obviously dangerous condition. Longshore and Harbor Workers' Compensation Act, § 5(b), 33 U.S.C.A. § 905(b).

6. Shipping — 84(3.2)

Vessel has duty to take necessary steps to protect longshoreworkers against open and obvious cargo defects and not just concealed ones. Longshore and Harbor Workers' Compensation Act, § 5(b), 33 U.S.C.A. § 905(b).

7. Shipping — 50,84(3.2)

Longshore worker who was injured on board vessel while offloading cargo stowed in open and obviously hazardous manner by foreign stevedores could maintain negligence action against vessel owner and time charterer. Longshore and Harbor Workers' Compensation Act, § 5(b), 33 U.S.C.A. § 905(b),

Marc Coleman, Middleton & Coleman, San Pedro, CA, for plaintiff-appellant.

Dawn Schock, Keesal, Young & Logan, Long Beach, CA, for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before: WOOD, Jr.,* REINHARDT, and RYMER, Circuit Judges.

REINHARDT, Circuit Judge:

We decide here that longshoreworkers who are injured on board vessels while off-loading cargo stowed in an open and obviously hazardous manner by foreign stevedores may maintain negligence actions against the vessels. The district court reached a contrary conclusion. Accordingly, we reverse the grant of summary judgment to the vessel, and remand.

I. Background

On October 2, 1989, Michael Riggs sustained injuries while working as a longshoreman for Stevedoring Services of America. Riggs and his longshore gang were assigned to unload cargo from the M/V Jalagopal. The Jalagopal was owned by Scindia Steam Navigation Company, Ltd. ("Scindia") and time-chartered by The Shipping Corporation of India ("SCI"). The vessel's cargo which had been loaded overseas by a foreign stevedore, consisted of three-inch steel pipe tubing bundle together and covered with slippery plastic wrapping. There was uncontested evidence, including expert testimony, that the on-loading stevedore had improperly stowed the cargo and that the pipes were strewn throughout the hold in an openly and obviously hazardous manner.[1] Riggs injured his back when he slipped between two pipe bundles during the unloading operations.

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*Honorable Harlington Wood, Jr., Senior United States Circuit Judge, Seventh Circuit Court of Appeals, sitting by designation.

[1]The pipes were stowed without dunnage (loose materials placed within the cargo to keep it from shifting) or shoring (vertical supports).

Riggs brought suit against Scindia and SCI (collectively "the vessel")[2] under section 5(b) of the Longshore and Harbor Workers' Ccompensation Act ("LHWCA"), 33 U.S.C section 905(b), claiming that the owner and the time-charterer of the Jalagopal had negligently failed to provide him a reasonable safe place to work. Riggs contended that the vessel's negligence consisted of its failure to supervise properly the cargo loading operations of the foreign stevedore. The district court granted summary judgment to the vessel on the basis that it had no legal duty to prevent or alleviate the unsafe conditions in the cargo hold, because the dangers were open and obvious to the longshoreworkers. We have jurisdiction under 28 U.S.C. section 1291, and we review the grant of summary judgment *de novo*.

II. Legal Framework

A. The 1972 Amendments to the LHWCA

Prior to 1972, vessels were strictly liable under the maritime doctrine of unseaworthiness for any injuries sustained by longshoreworkers due to unsafe on-board conditions. Although absolutely liable to the injured longshoreworkers, vessels were able to shift the cost by suing the stevedore-employers on the theory that they had breached an expressed or implied warranty of workmanlike performance. Because this sytem resulted in much unnecessary litigation. Congress amended the LHWCA in 1972 in an attempt to bring it into conformity with the practical realities of the maritime world. *See* H.R. Report No. 1441, 92 Cong., 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. 4698, 4702-04 (describing purpose of P.L. 92-576, Oct. 27, 1972, 86 Stat. 1251).[3]

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[2]As explained *infra*, section 5(b) of the LHWCA establishes the liability of "vessels" to injured longshoreworkers. Because a "vessel" includes its owner and charterer, both Scindia and SCI are potentially liable to Riggs. *See* 33 U.S.C. § 902(21); *see also Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539. 1542 (9th Cir. 1991) (same standards of care apply to shipowners and charterers). The question of any contractual indemnity between Scindia and SCI is not before us.

[3]The Senate Report, S. Report No. 1125, is identical in all relevant respects to the House Report.

[1] The 1972 amendments gave longshoreworkers a no-fault workers-compensation remedy against their stevedore-employers. 33 U.S.C. § 904. The amendments abolished a vessel's absolute liability to an injured longshoreworker under the unseaworthiness doctrine, but retained a statutory action against vessels for *negligence*. § 905(b).[4] In addition, the amendments barred vessels from seeking indemnity from the longshoreworker's "employer". *Id.* However, an "employer" is defined in such a way as to exclude foreign stevedores. *See* § 902(4). Thus, by its terms section 905(b) does not prohibit a vessel from obtaining a recovery against a foreign on-loading stevedore and does not allocate liability between those two entities.

The House Report states that the result of the 1972 amendments would be "to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third-party damages action is concerned." 1972 U.S.C.C.A.N. at 4703. The Report concludes:

> Permitting actions against a vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

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[4] That section provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone else entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this section and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

Section 933 *inter alia* provides that in certain situations the stevedore-employer is assigned the longshoreworker's right to sue the vessel for compensation. *See Carpenter*, 924 F.2d at 1541-42.

Id. at 4704. However, Congress did not specify the conditions under which a vessel could be liable for a breach of its duty of care, but instead left this task for the courts to resolve through the "application of accepted principles of tort law and the ordinary process of litigation." *Id.* The courts have proceeded to accept that responsibility, and this decision simply constitutes one further step in that process.

B. A Vessel's Duties to a Longshoreworker

Any discussion of the scope of the duties imposed by section 905(b) must begin with *Scindia Steam Navigation Company, Ltd. v. De Los Santos,* 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981). In *De Los Santos*, a longshoreman was injured while loading cargo into the ship's hold. The cargo fell from a pallet suspended by a winch, which was part of the ship's gear. The winch's braking mechanism had allegedly been malfunctioning for two days prior to the accident. In defining the vessel's duty of reasonable care under the circumstances the Court drew a line between "turn over" duties, which arise before the vessel is turned over to the stevedore and its longshoreworkers, and the other duties that arise after the vessel is turned-over. The case before us involves only the first type of duty — that which arises prior to turn over.

De Los Santos determined that a vessel's turn over duties extend *at least* to: 1) having the ship, its equipment, gear and tools, and the work space to be used in stevedoring operations in such condition that an experienced stevedore can by exercising reasonable care carry on its cargo operations with reasonable safety ("the turn over duty of safe condition"); and, 2) warning the stevedore of *hidden* dangers that are known to the vessel or should have been known to it in the exercise of reasonable care with respect to any hazards on the ship, in its equipment, gear or tools, or in the work space ("the turn over duty to warn"). 451 U.S. at 167, 101 S.Ct at 1622; *Bjaranson v. Botelho Shipping Corp.*, 873 F.2d 1204, 1207 (9th Cir.1989). It is the first turn over duty (safe condition) that is at issue here.

Riggs contends that the turn over duty of safe condition extends to cargo hazards that exist at the time of turn over, both "open

and obvious" and concealed. The vessel argues that under *De Los Santos* and the law of this circuit the turn over duty of safe condition extends only to the vessel and its equipment and not to its cargo at all.[5] The vessel is clearly wrong, at least in part. Ninth Circuit precedent squarely holds that the turn over duty of safe condition encompasses *concealed* hazards in cargo on-loaded by foreign stevedores. *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir.1981), *cert. denied*, 459 U.S. 967, 103 S.Ct. 294, 74 L.Ed.2d 278 (1982). Therefore, the only question for us to resolve is whether it extends to open and obvious defects in such cargo as well. We hold that it does.

III. Discussion

A. *Turner v. Japan Lines* Holds that the Turn Over Duty of Safe Condition Extends to Concealed Cargo Hazards Created by Foreign On-Loading Stevedores.

[2] In *Turner*, which was decided several months after *De Los Santos*, we rejected the argument that a vessel's turn over duties do not extend to the cargo stow. *Turner* involved an off-loading longshoreworker who was injured when a stack of plywood collapsed beneath him. Expert testimony indicated that the plywood had been improperly stowed by the on-loading foreign stevedore. We held that the vessel could be sued for failing to "protect" the injured longshoreworker against concealed cargo dangers, created by a foreign on-loading stevedore, of which the vessel knew or should have known, and which the vessel could, in the exercise of

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[5]In discussing the scope of the turn over duties in *De Los Santos*, the Supreme Court explicitly stated that the duty to warn extends to the "work space" but also implied that the duty of safe condition does so as well. *See* 451 U.S. at 167, 101 S.Ct. at 1622. Several circuits have concluded that the duty of safe condition extends to the "work space", but there is some disagreement as to whether the cargo falls within the term "work space". *Compare Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 535 (5th Cir.1986) (turn over duty of safe condition extends to ship's work space, which includes cargo) *with Kirsch v. Plovidba*, 971 F.2d 1026, 1031 n. 7 (3d Cir.1992) (turn over duty of safe condition applies to "physical work space" but not cargo). As explained in text, Ninth Circuit law is in accord with that of the Fifth Circuit.

reasonable care, have "corrected" or warned of.[6] *Id.*, 651 F.2d at 1304.

Our statement in *Turner* that a vessel has a duty to "correct" concealed dangers in the cargo before turning the vessel over to the off-loading stevedore makes clear that our decision there encompassed the turn over duty of safe condition as well as the turn over duty to warn. Moreover, we have subsequently described *Turner* as setting forth a vessel's duty "to make the ship safe for longshoremen before turning the ship over to the stevedore." *See Ollestad v. Greenville Steamship Corp.*, 738 F.2d 1049, 1052 & n. 2 (9th Cir.1984); *see also Martinez v. Korea Shipping Corp., Ltd.*, 903 F.2d 606, 610 n. 2 (9th Cir.1990) (citing *Turner* in the context of a discussion of the turn over duty of safe condition).

In the decision we review here, the district court correctly recognized that *Turner* addressed the turn over duty of safe condition but erroneously limited the *Turner* rule to *concealed* cargo defects. The district judge stated:

> While *Turner, supra,* involved liability created by a condition of the stow, the facts of *Turner* involved a concealed defect and not an "open and obvious" one. Plaintiff has failed to cite any Ninth Circuit authority wherein the shipowner has been held liable for an unsafe condition of the cargo which was open and obvious to the longshoremen working the hold.

The district court was correct that there is no direct Ninth Circuit authority on point. Rather our decision is dictated by the logic of our precedents.

Turner's holding that the turn over duties of safe-condition and warning encompass non-obvious dangerous conditions in stowed cargo rested on our conclusion that such a rule would further the

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[6]Because the case before us, like *Turner*, involves a *foreign* on-loading stevedore, we have no occasion to decide, and express no opinion regarding, whether a vessel has a duty to correct or warn of dangers (whether concealed or open and obvious) created by a domestic on-loading stevedore who is not the employer of the off-loading longshoreworkers.

Congressional goal of safety that underlies the LHWCA. 651 F.2d at 1304. We reasoned that neither the off-loading longshoreworker nor his stevedore-employer could exercise any control over the on-loading foreign stevedore. Only the vessel could do so, by choosing a reliable foreign stevedore, supervising its work when necessary, and correcting concealed dangers or warning the off-loading stevedore of them. *Id.* Moreover, we noted that in many cases, the injured worker could not sue the foreign stevedore, who would be beyond the reach of the processes of a federal district court. All of these factors are equally applicable in the case of an open and obvious cargo defect.[7]

We noted in *Turner* another factor that is also equally applicable to both types of *cargo defects*. We recognized that section 905(b) does not bar a shipowner from recovering against a foreign stevedore, who is not an "employer" within the meaning of the LHWCA, where the stevedore is primarily at fault for the off-loading longshoreworker's injuries. 651 F.2d at 1303-04. As we recently stated in *Carpenter v. Universal Star Shipping SA*, where we reaffirmed our holding and reasoning in *Turner*: "The prospect of vessel-initiated actions against foreign stevedores provides foreign stevedores with an incentive to do their work carefully." 924 F.2d 1539, 1544 (9th Cir.1991).[8]

Turner and *Carpenter* are fully consistent with *De Los Santos*. *Turner* simply resolves an issue not before the Court in the earlier case and *Carpenter* endorses that action. Because the accident in *De Los Santos* occurred while the domestic stevedore was *loading*

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[7]Because the injury in *Turner* was caused by a concealed cargo defect, there was simply no reason for us to discuss whether the same principle applies to open and obvious ones.

[8]In *Carpenter* we described *Turner* as holding vessels liable for their failure to "intervene" to protect the longshoreworker. 924 F.2d at 1539. Our use of the term "intervene" in *Carpenter* is somewhat confusing because, the "duty to intervene" is technically a post-turn over duty, *see, e.g., Bjaranson*, 873 F.2d at 1207, and *Turner* involved a ship's duties at the time of turn over. Nevertheless, our intent to hold vessels liable for their negligence in connection with the actions of foreign on-loading stevedores and our reasons for doing so are clear.

cargo onto the vessel and the alleged negligence pertained to the vessel's equipment, the Supreme Court simply had no reason to consider the scope of a vessel's turn over duties with respect to improperly stowed cargo, let alone cargo improperly stowed *before* stevedoring operations began.[9]

The vessel incorrectly asserts that *Taylor v. Moram Agencies*, 739 F.2d 1384 (9th Cir. 1984), holds that the turn over duty of safe condition does not extend to defects in the cargo. In *Taylor*, a longshoreman was injured when he fell while unloading mung beans. The bags containing the beans were torn, and as the longshoreworkers unloaded cargo, the beans blew onto the deck, eventually causing Taylor to fall. After a bench trial, judgment was entered for the vessel. The district court specifically found that the turn over duty of safe condition had *not been breached* because the stowage of the bags was not unreasonably dangerous. 739 F.2d at 1386. We affirmed.

The vessel misconstrues our statement in *Taylor* that the turn over duty of "safe condition focuses on the character of the ship and its equipment — not on the nature of the cargo", *id.*, as a holding that that duty does not apply to cargo defects. This sentence must be read in light of our conclusion that the cargo constituted a safe stow and did not become dangerous until hazardous conditions arose following the commencement of the off-loading stevedore's operations and the off-loading stevedore then acted unreasonably in the face of those conditions. If, as the vessel argues, the duty to turn over a vessel in safe condition does not include the cargo, then in *Taylor* we would not have determined that the cargo was not stored in a dangerous manner. We simply would have held that the vessel was immune as a matter of law from liability under a duty of safe condition theory because a cargo defect was the cause of the longshoremen's injuries.

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[9]Moreover, *De Los Santos* was primarily concerned with a dangerous condition that *developed* during cargo operations *after* the stevedore had taken control. *See Ollestad*, 738 F.2d at 1052; *accord Kirsch v. Plovidba*, 971 F.2d 1026, 1029 (3d Cir.1992) (*De Los Santos* turns on duty of ship's crew to intervene after stevedore has begun cargo operations); *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 298 (5th Cir.1984) (same).

In *Taylor*, we concluded that the reason that the unloading longshoreman was not entitled to assert a claim against the shipowner under the turn over duty of safe condition was because

> [t]he torn sacks of beans, lying in the hold posed no threat; it was only when the cargo discharge began and the wind blew the beans on the deck and winch platform that a hazardous condition developed. Thus, it was not the torn sacks but the stevedore's subsequent failure to take appropriate precautions in the course of the operation that created the danger.

Id., 739 F.2d at 1386.[10] *Taylor* is clearly distinguishable from the present case because there the stevedore-employer's own subsequent negligence created the hazard; here, is is the vessel's and the foreign stevedore's that is allegedly the cause. For the purpose of the case before us, both parties agree that the off-loading stevedore was not negligent in performing its cargo operations. Because it is undisputed for purposes of this appeal that the cargo was stowed negligently before the vessel was turned over to the off-loading stevedore, *Turner* and not *Taylor* is controlling.

B. A Vessel is Not Relieved as a Matter of Law From its Duty to Turn Over a Safe Cargo Stow Merely Because The Hazardous Condition is Open and Obvious.

[3] *Turner* establishes the proposition that the turn over duties of safe condition and of warning encompass *concealed* dangers in a cargo stow.[11] The remaining question is whether the fact that the defective condition of the cargo was open and obvious warrants a different result. The district court concluded that it

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[10]In *Taylor* we also rejected the longshoreworker's allegations that the vessel breached its post-turn over duties of intervention, active involvement, and control — duties not at issue here.

[11]Fifth and Eleventh Circuit law is in accord with our own. E.g., *Lemon v. Bank Lines Ltd.*, 656 F.2d 110, 116 (5th Cir. Unit A. Sep. 1981); *Spence v. Mariehamnms R/S*, 766 F.2d 1504, 1507 (11th Cir. 1985) (per curiam). The Third Circuit takes the contrary position. *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987) (rejecting *Turner*), *cert. denied*, 486 U.S. 1007, 108 S.Ct. 1733, 100 L.Ed.2d 196 (1988). We cited *Lemon* with approval in *Ollestad*, 738 F.2d at 1051.

did, and refused to allow Riggs' claim to go to trial. While Riggs agrees with the district judge that the turn over duty to *warn* applies only to hidden dangers, *see, e.g., De Los Santos*, 451 U.S. at 167, 101 S.Ct. at 1622; *Torres v. Johnson Lines*, 932 F.2d 748, 750 (9th Cir. 1991), he contends that the court erred in holding that the turn over duty of *safe condition* is similarly restricted.

As we noted in our discussion of *Turner, supra* at 1445-46, *all* of the considerations on which we relied in holding that a vessel can be liable for concealed cargo defects are equally applicable in the case of open and obvious defects. The rationale underlying *Turner* simply does not permit the distinction suggested by the vessel. Moreover, we have explicitly held that the obviousness of a non-cargo defect does not absolve the vessel of its duty to turn over the ship to a safe condition — a condition under which expert and experienced stevedores can operate safely. *Martinez*, 903 F.2d at 609-10. In *Martinez*, we expressly held that an *open and obvious* hazard may be unreasonably dangerous and therefore constitute a breach of the turn over duty of safe condition. *Id.* In doing so we rejected the argument that the duty of safe condition does not extend as a matter of law to open and obvious defects — at least insofar as the vessel and its equipment are concerned.[12]

The vessel argues that the rule set forth in *Martinez* is limited to the ship and its equipment and that the duty of safe condition does not apply to "open and obvious" defective cargo stows. We disagree. We can think of no sound reason for drawing such a

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[12]As we noted earlier, *De Los Santos* expressly limits the duty to warn to hidden defects but does not place a similar restriction on the duty of safe condition. *See* 451 U.S. at 167, 101 S.Ct. at 1622. Other courts have recognized this distinction and allowed for actions for injuries caused by open and obvious defects under the duty of safe condition but not under the duty to warn. See *Woods v. Sammisa Co. Ltd.*, 873 F.2d 842, 852 & n. 13 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050, 110 S.Ct. 853, 107 L.Ed.2d 847 (1990); *see also Spence v. Mariehamms R/S*, 766 F.2d 1504, 1507 (11th Cir. 1985) (analyzing hidden versus obvious only as to the duty to warn).

distinction in the case of cargo stows only.[13] The sensible principle *Martinez* enunciates is that a vessel's failure to "correct" an open and obvious defect may constitute unreasonable conduct leading to the imposition of liability. That principle has equal force with respect to hazards in the stowage and hazards occurring elsewhere on the vessel. Moreover, given that under *Turner* vessels already have a duty to supervise the on-loading operations of foreign stevedores to avoid non-obvious cargo defects, there would seem to be little extra burden in requiring them to be alert at the same time to the creation of cargo hazards that are open and obvious.

[4, 5] The vessel suggests that in the case of obvious dangers the longshoreworkers have the opportunity to make a conscious decision to refuse to unload or bring the defects to the attention of the stevedore or vessel. However, the argument is foreclosed by the fact that neither assumption of the risk nor contributory negligence is a defense under the LHWCA. *De Los Santos*, 451 U.S. at 165 n. 13, 101 S.Ct. at 1621. As the *De Los Santos* Court stated, a vessel may not defend a suit brought against it under section 905(b) on the ground that the injured longshoreworker should have refused to continue in the face of an obviously dangerous condition. *Id.* at 176 n. 22, 101 S.Ct. at 1626 n. 22.

[6] For the foregoing reasons, we hold that a vessel has a duty to take the necessary steps to protect longshoreworkers against open and obvious cargo defects and not just concealed ones.[14] Our holding is in accord with the law of the Fifth Circuit

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[13]While it is true that *Martinez* does not refer to cargo, there is no reason that it should have done so since the case involved a defective ladder.

[14]Of course, a plaintiff in a particular case may fail to produce at trial sufficient evidence of an unreasonable danger to support a finding of a *breach* of the turn over duty. *See Ludwig v. Pan Ocean Shipping Co., Ltd.*, 941 F.2d 849, 851-52 (9th Cir. 1991) (per curiam); *Bjaranson*, 873 F.2d at 1208-09. Because "certain dangers that may be hazardous to unskilled persons need not be remedied if an expert and experienced stevedore could safely work around them." *Torres*, 932 F.2d at 751 (internal quotation omitted), it may well be that a particular hazard that is open and obvious may not constitute an unreasonable danger to

on this question. *Woods v. Sammisa Co. Ltd.*, 873 F.2d 842, 848, 850 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050, 110 S.Ct. 107 L.Ed.2d 847 (1990); *Harris v. Flota Merchante Grancolombiana, S.A.*, 730 F.2d 296, 299-300 (5th Cir. 1984). As noted earlier, the Third Circuit takes the position that the turn over duty of safe condition does not encompass *any* cargo-stow defects, whether hidden or obvious. No circuit, however, has adopted a rule similar to that urged by the vessel — that a duty exists as to concealed cargo defects but not as to open and obvious ones. We see no reason to create further confusion in this already complicated area of the law by drawing such an untenable and artificial distinction. Therefore, we join the Fifth Circuit in holding that the duty of safe turn over encompasses open and obvious, as well as concealed cargo hazards.

IV. Conclusion

[7] *Turner* holds that the turn over duty of safe condition extends to concealed cargo defects. *Martinez* holds that that duty applies to open and obvious equipment (and vessel) hazards, as well as to concealed ones. We now complete the circle. Taken together, *Turner* and *Martinez* lead directly and inexorably to the conclusion that a vessel's turn over duty of safe condition extends to protecting against open and obvious cargo hazards. Accordingly, the judgment of the district court is REVERSED and the case REMANDED for further proceedings consistent with this opinion.[15]

REVERSED and REMANDED.

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longshoreworkers. However, that factual issue is separate from the legal question whether there exists a duty to turn over a vessel that does not contain any unreasonably dangerous defects, cargo, or otherwise, open or concealed.

[15]The vessel argues that the award of summary judgment in its favor can be upheld on the basis that Riggs was hired to correct a dangerous stow and that under our decision in *Peters v. Titan Navigation Co.*, 857 F.2d 1342, 1344-45 (9th Cir. 1988), a repairman has no right to recover for injuries caused by the very condition he was hired to fix. The district court properly rejected this theory under the facts of this case.

RYMER, Circuit Judge, concurring:

I concur because the reasoning of *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967, 103 S.Ct. 294, 74 L.Ed.2d 278 (1982), which holds that a vessel has the duty to protect longshoremen against concealed conditions created by a foreign stevedore, which the vessel could have corrected or warned of, leads inexorably to the conclusion that the vessel has a duty of care with respect to cargo conditions whether the dangers are concealed or not. I write separately to note that until now, the turn over duty has focused on the character of the ship and its equipment, not on the condition of the cargo. *See, e.g., Ludwig v. Pan Ocean Shipping Co.*, 941 F.2d 849 (9th Cir. 1991) (duty to have ship and its equipment safe for stevedore operations); *Taylor v. Moram Agencies*, 739 F.2d 1384 (9th Cir. 1984) (vessel not liable for hazards which develop as a result of cargo operations). By the same token, the duty to warn has existed only with regard to hidden or concealed dangers. *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981); *Turner*, 651 F.2d at 1304. By imposing a turn over duty of care to protect stevedores from poor cargo conditions, we are exposing the shipowner to liability equally for lack of reasonable care as to the vessel or the vessel's equipment, and as to the condition of the cargo (at least when stowed by a foreign stevedore). It is unclear that this squares with the restrictive rules of liability of shipowners to stevedores envisioned by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), or with the scope of a shipowner's duties recognized in *De Los Santos*. In any case, should *Turner* have led us astray, either the Congress or the Court can set us straight.

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No. 90 4812 HLH (Sx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL RIGGS,
Plaintiff,
vs.
SCINDIA STEAM NAVIGATION COMPANY, LTD.
AND SCINDIA LINES,
Defendants.

ORDER GRANTING SUMMARY JUDGMENT

Date: November 25, 1991
Time: 10:00 a.m.
Courtroom of the Hon. Harry L. Hupp

This Court having considered defendants SCINDIA STEAM NAVIGATION COMPANY LTD. and THE SHIPPING CORPORATION OF INDIA's ("defendants") Motion for Summary Judgment and the evidence in support thereof, plaintiff MICHAEL RIGGS' opposition to the Motion for Summary Judgment and all response thereto, in addition to the arguments of counsel heard at the hearing of the insant motion on November 25, 1991, has concluded that no material factual issues are in existence and that summary judgment is appropriate and is therefore granted, dismissing plaintiff MICHAEL RIGGS' claims against defendants.

The Court notes that defendants' Motion for Summary Judgment presents only questions of law, not fact. The only issue of fact made out by plaintiff is on a matter irrelevant under the

applicable law and summary judgment must therefore be granted in defendants' favor.

Under the seminal case addressing the liability of vessel interests to a longshoreman under Section 905(b) of the Longshore & Harbor Workers' Compensation Act, *Scindia Steam Navigation Company, Ltd. v. De Los Santos*, 451 U.S. 156 (1981), in order for a plaintiff longshoreman to recover against vessel interests, the longshoreman must show that the defendant violated one of two relevant duties: (1) the duty to warn the stevedore of a non-obvious hazard aboard the vessel; or (2) the duty to turn over to the stevedore the vessel and its equipment in a reasonably safe condition. While there is a third possibility, in the form of a duty to intervene, that duty is not relevant under the facts of this case.

Based on the respective parties' Statement of Material Facts, it is undisputed for the purposes of this motion that the hazard which allegedly caused plaintiff's injury, the "helter skelter" condition of the stow of the cargo and the fact that the cargo had been covered with a slippery blue plastic sheeting, was open and obvious. Accordingly, the duty to warn is not implicated under *Scindia* inasmuch as the duty to warn exists on the part of the shipowner only with regard to hidden or non-obvious dangers. *Scindia, supra*, at 167; *Taylor v. Moram Agencies*, 739 F.2d 1384 (9th Cir. 1984); *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981). The Court takes specific notice of Judge Fletcher's opinion in *Turner, supra*, and notes that the *Turner* court spoke of the duty to warn in terms of a "duty to protect against *concealed* dangers." 651 F.2d at 1304 (Emphasis added). Plaintiff having conceded that the condition of the cargo which allegedly caused his injury was open and obvious, there is no question as to the applicability herein of the *Scindia* duty to warn.

With regard to the turnover duty of ordinary care, plaintiff sets forth no facts evidencing any unsafe condition of the vessel itself or its equipment. As noted above, the unsafe condition alleged was created by the manner of wrapping and stowing the cargo. Plaintiff does present respectable opinion testimony that the cargo was originally stowed in an unsafe manner, that the wrapping compounded the danger, and that the vessel JALAGOPAL's officers must have known of the danger. If this opinion were

relevant, it would prevent the granting of summary judgment inasmuch as the obvious nature of the danger would not preclude liability for an unsafe condition of the ship or its equipment. However, the cargo is not the vessel or its equipment, and plaintiff may accordingly not maintain his action based on a breach of the turnover duty of ordinary care. As is made clear in *Taylor, supra*, at 1386, and *Bjaranson v. Botelho Shipping Corp., Manila*, 873 F.2d 1207, 1208 (9th Cir. 1989), the turnover duty focuses on the character of the ship and its equipment, and not on the nature of the cargo. While *Turner, supra*, involved liability created by a condition of the stow, the facts of *Turner* involved a concealed defect, not an "open and obvious" one. Plaintiff has failed to cite any Ninth Circuit authority wherein the shipowner has been held liable for an unsafe condition of the cargo which was open and obvious to the longshoremen working the hold.

This Court additionally takes notice that the reason for the restrictive rules of liability of shipowners to stevedores is set forth in the policy of law which greatly enhances the stevedore's benefits under worker's compensation. That same law sought to achieve a balance by restricting the rights of stevedores to pursue actions against a shipowner on the theory that the stevedore should be able to handle obvious cargo conditions, absent hidden dangers, and absent unsafe vessel equipment.

The Court further finds that defendants' other theories on which summary judgment is sought, assumption of the risk and preclusion of a repairman recovering when injured by the condition he was hired to correct, are without merit and are not the basis for the granting of summary judgment herein.

The Court therefore finds that no issues of material fact exist so as to preclude summary judgment in favor of defendants and dismissing plaintiff's claims. Summary judgment is therefore granted.

IT IS SO ORDERED, ADJUDGED AND DECREED ON THIS 18TH DAY OF DECEMBER, 1991.

Dated: December 18, 1991

HARRY L. HUPP
HONORABLE HARRY L. HUPP
United States District Judge

ENTRY AND APPROVAL REQUESTED:
Dated: December 10, 1991

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Scindia Steam Navigation Company, Ltd.
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APPROVED AS TO FORM AND CONTENT
Dated: December 10, 1991
LAW OFFICES OF DIANE L. MIDDLETON

By: MARC COLEMAN/MLA
MARC COLEMAN, OF
COUNSEL
Attorneys for Plaintiff
Michael Riggs
(Per Telephone Authorization)

No. 91-55146
NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD GODFREY,
Plaintiff-Appellant,

v.

M/V BARONIA; HYUNDAI MERCHANT MARINE CORPORATION,
Defendants-Appellees.

D.C. No. CV-89-1690-JSL

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Submitted February 6, 1992**
Pasadena, California

BEFORE: BRUNETTI, O'SCANNLAIN, and T.G. NELSON, Circuit Judges

OVERVIEW

Richard Godfrey, the appellant, sued the M/V Baronia and its charterer, Hyundai Merchant Marine Co., under the Longshore and Harbor Workers' Compensation Act, 22 U.S.C. §§ 901-950. Godfrey, a longshoreman, was injured when a pre-slung load being unloaded from the M/V Baronia broke. Several steel pipes rolled onto and crushed his foot. He alleged that the M/V Baronia was negligent in failing to warn the off-loading stevedore that excess dunnage in the cargo, loaded by a foreign stevedore,

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 3(f).

presented a hazard. The district court granted summary judgment in favor of the defendants, holding that the defendants did not violate a duty to turn the vessel over in safe condition or to warn the stevedore of the excess dunnage in the cargo. We affirm.

FACTS

The M/V Baronia was loaded with steel pipe by a foreign stevedore in Korea. The pipe was loaded into the cargo holds in pre-slung loads of separate bundles of three pipes. Considering the facts in the light most favorable to Godfrey, the foreign stevedore placed dunnage (loose timber used to support cargo) *within* the pre-slung loads of pipe. This is an unusual manner of stowage. Apparently, the loading was observed only by the ship's electrician.

After the M/V Baronia arrived in Los Angeles, the Metropolitan Stevedore Company began to unload the cargo. The superintendent of operations, the ship boss, and the hatch boss all testified that they reviewed safety concerns before unloading the cargo. The accident occurred on the dock on the fourth day of the unloading. It allegedly resulted from a piece of dunnage in the pre-slung load breaking loose and causing the pipe to roll forward.

Godfrey sued under 33 U.S.C. § 905(b) to recover for an injury "caused by the negligence of a vessel." He alleged that the M/V Baronia failed to meet its duties under *Scindia Steam Navigation Co. V. De Los Santos*, 451 U.S. 156 (1981). Specifically, he maintained that the M/V Baronia violated its turnover duty of safe condition and its turnover duty to warn.

At an oral hearing the district court concluded that because the turnover duty of safe condition applies only to conditions on the ship or its equipment, the M/V Baronia was under no duty with respect to the manner in which the dunnage was placed in the cargo. The court found that the turnover duty to warn did not apply because the stevedores had actual knowledge of the excessive dunnage in the cargo. The court therefore granted summary judgment in favor of the defendants/appellees. We agree with the conclusions of the district court.

DISCUSSION

We review a grant of summary judgment de novo. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990). "Summary judgment may be granted only if, viewing the evidence in the light most favorable to the nonmoving party, there is no 'genuine issue as to material fact and the moving party is entitled to judgment as a matter of law.' " *Martinez v. Korea Shipping Corp.*, 903 F.2d 606, 608 (9th Cir. 1990) (quoting Fed. R. Civ. P. 56(c)).

An action for negligence is usually a mixed question of law and fact. *Id.* at 609. However, "[t]he existence and extent of a duty of care are questions of law." *Id.* Thus, although "[s]ummary judgment is rarely granted in negligence cases," *Id.*, if the district court is correct that the M/V Baronia owed no duty of care, we must uphold the summary judgment. *See Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539, 1541-42 (9th Cir. 1991).

I. The M/V Baronia Did Not Violate Its Turnover Duty of Safe Condition

The Supreme Court has held that under 33 U.S.C. § 905(b) a ship can be negligent for failing to "exercise[e] ordinary care under the circumstances to have *the ship and its equipment* in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property." *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 167 (1981) (emphasis added). This is the so-called "turnover duty of safe condition." *Bjaranson v. Botelho Shipping Corp.*, 873 F.2d 1204, 1207 (9th Cir. 1989). This duty does not apply here because Godfrey is alleging that the condition of the cargo, *not* the ship or its equipment, was dangerous.

By its terms, the turnover duty of safe condition applies to the ship and its equipment only. We have always spoken of the duty to turnover "the ship and its equipment . . . in a safe condition." *Id.* "The scope of the shipowner's duty as set forth in *Scindia* focuses on the character of the ship and its equipment — not on the nature of the cargo." *Taylor v. Moram Agencies*, 739 F.2d

1384, 1386 (9th Cir. 1984). The Supreme Court limited the safe turnover duty "to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations." *Scindia*, 451 U.S. at 167.

We will not stretch this duty to include a duty to turnover cargo in a condition that presents no risk that once upon the dock the cargo might cause an accident. In closely related contexts we have firmly limited the ship's duty to "the ship itself" or the "ship's 'gear.' " *Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539, 1543 (9th Cir. 1991).

We conclude that as a matter of law, because Godfrey does not allege that the ship or its equipment was unsafe, the M/V Baronia did not violate its turnover duty of safe condition.

II. The M/V Baronia Had No Duty To Warn About The Excess Dunnage

Godfrey also asserts that the M/V Baronia violated a duty to warn the stevedore of the excess dunnage within the pre-slung loads of pipe. A vessel has a duty to "warn[ ] the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and *that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent* in the performance of his work." *Scindia*, 451 U.S. at 167 (emphasis added). This duty to warn does not apply in this case because the danger here, the excess dunnage in the cargo, was not hidden or nonobvious and should have been anticipated by a competent stevedore.[1]

The duty to warn only applies to hidden or nonobvious dangers. *Ludwig v. Pan Ocean Shipping Co., Ltd.*, 941 F.2d 849, 851 (9th Cir. 1991); *Bjaranson v. Botelho Shipping Corp.*, 873 F.2d 1204, 1208-09 (9th Cir. 1989); *Taylor v. Moram Agencies*, 739 F.2d

---

[1]This is not to imply that Metropolitan Stevedore Co. was not competent. To the contrary, as explained, it seems apparent that Metropolitan did anticipate the danger.

1384, 1387 (9th Cir. 1984); *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, 1304 (9th Cir. 1981); *cert. denied*, 459 U.S. 967 (1982), *amended* 707 F.2d 752 (1983). When a party moves for summary judgment and the nonmoving party must "make a sufficient showing to establish the existence" of a genuine factual issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). Godfrey has not met his burden of demonstrating a genuine issue of fact as to whether the danger from the excess damage was not known, and should not have been known, to the stevedore.

As noted above, the superintendent of operations, the ship boss, and the hatch boss all testified that they reviewed safety concerns before unloading the cargo. The superintendent testified at a deposition that he had seen the excess dunnage *in* the pre-slung pipe before the accident. The hatch boss stated that "it seems like there was quite a bit of damage on this particular job."

Godfrey contends that the deposition testimony refers to dunnage *outside* of the pre-slung pipe and that the damage within the pre-slung load could not be seen until it was already off the vessel. This response is not enough to establish a genuine issue of fact as to whether the danger was actually hidden and should not have been anticipated by the stevedore. First, even if the dunnage in the pre-slung loads could not be seen in the hold, for four days loads were removed from the vessel. Thus, the stevedore would have seen, and indeed guarded against, the risk from the dunnage in the cargo.

Furthermore, the evidence establishes that Metropolitan, as any reasonably competent stevedore would, anticipated the danger posed by excess dunnage. The hatch boss testified that in morning inspections he would "check the general condition of the ship" and for "excessive dunnage." The ship boss indicated that experienced longshoremen would recognize a hazard from excessive dunnage in a pre-slung load. The superintendent in his deposition acknowledged that prior to the accident he was aware of the hazard presented by the dunnage in the loads.

In *Taylor*, 739 F.2d 1386, a longshoreman was injured after he slipped on mung beans that had leaked from torn sacks being unloaded from a vessel. The court noted that it was not the

condition of the cargo, but the stevedore's failure to take adequate precautions that created the danger. *Id.* The court upheld the trial court's finding that there was "no hidden danger of which the shipowner had a duty to warn in the fact of the evidence here demonstrating that the stevedores were well aware of this particular problem." *Id.* at 1387. In Godfrey's case as well, there was not a hidden danger that the vessel had a duty to warn about.

In fact, this appeal closely resembles a case from the Eleventh Circuit, *Spence v. Mariehamns R/S,* 766 F.2D 1504, 1507 (11th Cir. 1985). In *Spence*, rolls of paper were stored in the hold of a ship with a loose and unsecured top tier. *Id.* at 1507. The court held that, "The shipowner's duty to warn of unknown dangers was not triggered here because the uncontradicted evidence disclosed that the stevedore and the longshoreman knew of the danger posed by a loosened or unchocked tier." *Id.* Similarly, the M/V Baronia had no duty to warn.

Godfrey relies on *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, 1304 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), *amended* 707 F.2d 752 (1982), which found the vessel liable for failing to warn the off-loading stevedore of a danger created by the method of stow used by a foreign stevedore. In that case, however, the court carefully noted the "concealed dangerous conditions." *Id.* The court stated that the danger was "invisible to the off-loading longshoreman." *Id.* at 1302. The concealed nature of the danger distinguishes *Turner.*

CONCLUSION

The ruling of the district court is AFFIRMED.

Supreme Court, U.S.
FILED
APR 28 1994
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No. 93-1293

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

SCINDIA NAVIGATION COMPANY, LTD.
and
THE SHIPPING CORPORATION OF INDIA,

Petitioners,

vs.

MICHAEL RIGGS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Can a vessel be held liable under 33 U.S.C. §905(b) when its negligence creates an unreasonably dangerous but open and obvious condition in the stow which the off-loading longshoremen must encounter notwithstanding the risk?

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United States Supreme Court Rule 10 12

NO. 93-1293

IN THE
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Michael Riggs (hereinafter "Riggs") submits his Brief In Opposition To The Petition For Writ of Certiorari submitted by Petitioners Scindia Steam Navigation Company, Ltd. and The Shipping Corporation of India, Ltd. (collectively "the vessel") seeking review of the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on November 8, 1993.

STATEMENT OF THE CASE

Riggs, an experienced longshoreman, was discharging steel pipe bundles from the hold of the ship "Jalagopal" at the time of his accident. The steel bundles, each weighing several tons, had apparently been dumped into the hold by the foreign stevedores under the supervision of the vessel. Uncontradicted testimony evidenced a total lack of cargo separation or shoring of any kind.

Worse yet, numerous bundles were wrapped with plastic, making conditions slippery.

The stowage was thus exceptionally hazardous. Uncontradicted expert testimony credited by the district court established the following. The hazardous condition of the cargo stowage was open and obvious. The longshoremen working the hatch including Riggs used the only work method available to get the cargo out. No safer alternative work method was available. Nothing Riggs or his coworkers did caused or contributed to causing Riggs' accident.

As to vessel negligence, the uncontradicted testimony established that maritime custom and practice required the vessel through its officers to responsibly supervise the loading operation and ensure that stowage was done properly and safely. Ensuring proper stowage meant making sure that the cargo was loaded in such a way that it could be safely discharged in the off-loading port. Further, the uncontradicted testimony established

that the vessel had the obligation as a matter of maritime custom and practice to intervene and correct any improper stowage as it occured.

Given the condition of the stow, the vessel knew or should have known about the extremely hazardous nature of the cargo conditions, failed to intervene, and therefore acted negligently to create the factors which caused Riggs' accident. On these facts, Riggs sued the vessel for negligence under 33 U.S.C. §905(b). The vessel's sole argument in its own defense was that unreasonably dangerous defects in cargo stowage which are open and obvious cannot be the basis of vessel liability to a longshoreman.

REASONS FOR DENYING THE WRIT

I

RIGGS IS CONSISTENT WITH APPLICABLE STATUTES, LEGISLATIVE HISTORY AND LONG-STANDING PRECEDENT

The 1972 amendments to the Longshore And Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. ("LHWCA") dramatically altered the relationships of longshoremen to their employers and third parties. That transformation, however left vessel owners and operators liable for their own negligence. 33 U.S.C. 905(b). Although absolute liability, unseaworthiness and non-delegable duties vanished from the remedies available to injured longshoremen against vessel owners, Congress made it adamantly clear that longshoremen remained able to sue a ship owner for negligence just as a land-based worker could sue a third party for negligence. In language

which fully governs this case, the House Report stated:

> "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this Bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition."

House Report 92-1441, U.S. Code Congressional & Administrative News, Vol. 3, p. 4704 (1972). (Emphasis added).

The legislature's mandate has been followed consistently through this Court's precedents in Marine Terminals v. Burnside Shipping Company, 394 U.S. 404 (1969) and Scindia Steam Navigation Company, Ltd. vs. De Los Santos, 451 U.S. 156 (1981). Where vessel negligence has caused injury to longshoremen, actions for negligence have been permitted.

To state a case as why the Writ for Certiorari should be granted, the vessel mistakes the legal propositions at issue in Riggs. In truth, Riggs stands for the wholly unremarkable proposition that a person (including a vessel) may be held liable for its own negligence.

In urging novelty justifying review, the vessel contends that holding it liable for on-loading stevedore negligence is the equivalent of imposing absolute liability or unseaworthiness. Petitioner's Brief p. 11. The vessel totally ignores the records in Riggs. The undisputed testimony in Riggs, credited by the district court,

established as a matter of fact, that the vessel was negligent in failing to supervise and intervene in obviously improper loading operations and further that maritime practice and custom imposed such obligations. Thus, liability was not premised on some derivative form of liability such as respondeat superior or strict liability or some other form of burden-shifting but rather on unrebutted testimony that the vessel itself had acted negligently to cause the accident. Riggs has never attempted to claim anything other than that the vessel should be liable for its own negligence.

Second, the vessel argues that §905(b) does not reach vessel negligence concerning stowage as opposed to the ship and its equipment and fixtures. This is a distinction without a difference. Nothing in §905(b) or the legislative history limited vessel negligence to specific parts of the ship or equipment or fixtures as opposed to other kinds of negligence such as improper supervision of the crew. The vessel seizes upon non-exclusive

listings set forth in various cases and misses the essential point set forth in Scindia.

> "We held in Marine Terminals v. Burnside Shipping Co., 394 US 404, 415, 22 L. Edd 2d 371, 89 S. Ct. 1144 (1969), that the vessel owes to the stevedore and his longshoremen employees the duty of exercising due care "under the circumstances". This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property."

Scindia at 451 US 166 (Emphasis added).

The key element to actionable vessel negligence is whether or not the longshoremen will be able by the exercise of reasonable care to discharge the cargo. Id.; Marine Terminal supra. at 394 U.S. 416-417 (1969). There is simply no basis in law, fact, reason or legislative intent to eliminate vessel-caused defects in stowage as a basis of actionable negligence.

II

NO BASIS UNDER RULE 10 JUSTIFIES REVIEW

Riggs is fully consistent with long-standing Ninth Circuit precedent holding that cargo can be the basis of a negligence claim against the vessel, Turner v. Japan Lines, Ltd., 651 F. 2d 1300 (9th Cir. 1981) cert. denied 459 U.S. 967, 103 S. Ct. 294, 74 L. Ed. 2d 278 (1982) and that open and

obvious conditions will not relieve the vessel of liability if the longshoremen must face the risk. Martinez v. Korea Shipping Corp., Ltd., 903 F. 2d 606, 609-10 (9th Cir. 1990). Wedding these two precedents compelled the conclusion that an open and obvious but unavoidable hazard in the cargo could serve as a basis for liability. As noted by the vessel, this precedent is long standing in the Fifth Circuit also. The Third Circuit holds to the contrary.

This court has granted certiorari in Howlett v. Birkdale Shipping Co., S.A., No. 93-670 which appears to address the precise issue in Turner not Riggs. That issue is whether or not the ship owner owes a duty of care with regards to unsafe conditions in cargo which are unknown to the longshoremen, not open and obvious and not normally anticipated. The only similarity between Howlett and Riggs is that they both involve cargo defects. Riggs however involves a much more extreme example of negligence in that the defects

of which Riggs complained must have been apparent to the vessel and its officers during the loading process whereas the hidden defects complained of in Howlett may not have been. Riggs does not constitute a decision in conflict with the decision in Howlett, at least as far as the question certified to this court. Riggs does, however, pose in the starkest terms possible the issue of whether or not a vessel may be held liable under any circumstances for defects in cargo stowage.

CONCLUSION

Riggs stands for the obvious proposition that a vessel is liable for negligence which causes injury to a longshoreman. That unremarkable proposition does not merit the grant of a Writ of Certiorari. Howlett, accepted by this Court for review, involves hidden defects in the stowage as a basis for liability thereby presenting quite

different facts and theories from those present in Riggs. Accordingly, Riggs urges the Petition For Writ of Certiorari be denied as the instant case does not fall within the considerations set forth in Rule 10 of the Rules of the Supreme Court.

Dated: 4-25-94

LAW OFFICES OF DIANE L. MIDDLETON

By _____

Marc Coleman, Of Counsel
Attorneys for Respondent
MICHAEL RIGGS

Supreme Court, U.S.
FILED
MAY 27 1994
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(3)

No. 93-1293

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

SCINDIA STEAM NAVIGATION COMPANY, LTD.
and
THE SHIPPING CORPORATION OF INDIA, LTD.,
Petitioners,
v.
MICHAEL RIGGS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

I.

Introduction

The brief of respondent MICHAEL RIGGS ("respondent") in opposition to the petition for writ of certiorari is based entirely upon an expert's declaration which was submitted to the trial court in opposition to the motion for summary judgment of petitioners SCINDIA STEAM NAVIGATION COMPANY, LTD. and THE SHIPPING CORPORATION OF INDIA, LTD. ("petitioners"). The declaration, however, is irrelevant to the resolution of the issue which is central to this case: Does a vessel's legal duty of care owed to a longshoreman extend to open and obvious, unsafe conditions in the cargo stow?

Because respondent takes great liberties in characterizing the content of the expert declaration, without providing this Court with the declaration itself, a copy of it is reproduced in the Appendix beginning at page 26a. A review of the

declaration reveals both its irrelevance to the issue presented for certification and the inaccurate treatment afforded it in the opposition to certification.

II.

Legal Argument

A. The Declaration Is Irrelevant To The Issue Of The Duty Owed By The Vessel To The Longshoreman.

Respondent's reliance upon the expert declaration ignores that the issue of whether the vessel owed a duty to the longshoreman is a question of law. This Court outlined the duty owed in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981). The varying interpretations of that duty by the Circuit Courts of Appeals — particularly in regard to hazards posed by the cargo rather than by the vessel and its equipment — has created the conflict which prompted the filing of the present petition for writ of certiorari. On the one hand, the Third Circuit Court of Appeals has determined that a vessel owes no duty to an off-loading longshoreman "with respect to cargo not loaded by or under the active supervision of the vessel." *Derr v. Kawasaki Kissen K.K.*, 835 F.2d 490 (3d Cir. 1987). The Ninth Circuit Court of Appeals, on the other hand, held in this case that "a vessel has a duty to take the necessary steps to protect longshoreworkers against open and obvious cargo defects." *Riggs v. Scindia Steam Navigation Co.*, 8 F.3d 1442, 1448 (9th Cir. 1993).

In light of this conflict regarding the legal duty owed by a vessel to an off-loading longshoreman, the assertion in respondent's opposition brief that the declaration "established *as a matter of fact* that the vessel was negligent in failing to supervise and intervene in obviously improper loading operations" is anomalous. (Opposition Brief, p. 7.) The implication which respondent attempts to foster, of

course, is that the declaration establishes that the vessel in fact participated in some way in the loading of the cargo. The declaration, however, provides no factual foundation for that implication. The declarant was not a percipient witness to any of the events in question. He provides his opinion based solely upon his review of the transcript of the respondent's deposition, a review of the charter party agreement, and a maritime survey of the vessel. (App. at 27a, ¶ 5.) Nowhere in the declaration is there any indication that the declarant had any knowledge that any crew member or other vessel agent was in attendance at the loading of the vessel. In short, the declaration provides no factual basis for the implication that the vessel participated in any way in the loading of the cargo.

Moreover, while the opposition brief states that the trial court "credited" the expert testimony,[1] a review of the district court's order indicates that the district court gave the expert declaration no credit in its analysis of the open and obvious nature of the danger posed by the cargo, and the court deemed the expert declaration irrelevant on all other issues. (App. at 15a-18a.) The fact that the declaration was not contradicted in the trial court indicates only that petitioners, like the district court, recognized that it was irrelevant to the issue at hand. Petitioners did not, as the opposition implies, stipulate to the contents of the expert declaration.

The issue before the trial court and before this Court is whether the vessel owed a legal duty to participate in the loading of the cargo in order to prevent later harm to an off-loading longshoreman. The expert declaration offers nothing relevant to the analysis of that issue.

---

[1]Although the opposition brief refers to "expert testimony," the only expert evidence submitted to the trial court was the declaration contained in the Appendix.

B. The Declaration Is Incompetent To Establish A Custom and Practice.

Respondent also asserts that the declaration establishes a custom and practice in the maritime industry for a vessel to supervise loading. Yet, the only basis for that assertion in the declaration is the unsupported assertion that "it is the custom and practice in the maritime industry that the vessel is responsible for the condition of the cargo which is loaded and stowed in foreign ports for discharge here." (App. at 27a, ¶ 6.) This is insufficient to establish a custom and practice.

As this Court has long held, a witness who wishes to establish a custom and practice must lay a foundation of knowledge of the existence of the elements of the custom, including its antiquity, its geographical scope, the fact that it is generally known, the fact that it is uniformly practiced, and the fact that it is regarded as obligatory. *Oelricks v. Ford,* 64 U.S. (23 How.) 49 (1860). The delcaration in question here makes no attempt to lay the necessary foundation.

III.

Conclusion.

The expert declaration relied upon in opposition to the petition for writ of certiorari is irrelevant to the determination of the duty owed by the vessel to an off-loading longshoreman. Because the Circuit Courts of Appeals are in conflict as to the duty owed, the petition should be granted.

Respectfully submitted,

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Dated: May 26, 1994

APPENDIX

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL RIGGS,
Plaintiff.

vs.

SCINDIA STEAM NAVIGATION COMPANY, LTD. AND THE SHIPPING CORPORATION OF INDIA, LTD.,
Defendants.

FILED: CLERK, U.S. DISTRICT COURT
OCTOBER 11, 1991

CASE NO. 90 4812 HLH (Sx)

DECLARATION OF HEINZ W. FRISCH
IN OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT

DATE: October 28, 1991
TIME: 10:00 a.m.
COURTROOM: Honorable Harry L. Hupp

I, Heinz W. Frisch, declare as follows:

1. I am an individual residing at 28538 Vista Madera, Rancho Palos Verdes, California. I have been retained by plaintiff in the above-captioned action to render my opinion as an expert concerning liability.

2. The matters set forth in this Declaration are either matters of my own personal knowledge or my expert opinions based on my experience in the maritime industry and review of the facts of this case. If called as a witness, I could and would testify competently to the facts and opinions set forth herein.

3. Attached hereto as Exhibit "A" is my eight page resume detailing my experience as an Area Supervisor and Assistant Area Supervisor for the Pacific Maritime Association, Casualty Claim Adjuster for Hartford Insurance Company and Casualty Adjuster for Pacific Indemnity Insurance Group. I retired from my position as Area Supervisor for the Pacific Maritime Association on July 31, 1982.

4. From 1961 until my retirement in 1982, I had an ever increasing involvement in the maritime industry. I am fully familiar with the maritime custom and practice in the Ports of Los Angeles/Long Beach, Port Hueneme and San Diego with respect to the discharge and loading of cargo, longshore operations, application of Pacific Coast Marine Safety Code, Federal Occupational Health and Safety Regulations, California State Safety Code and other rules and regulations pertaining to longshoring. As part of my duties at the Pacific Maritime Association, I would attend onboard vessels for the purpose of evaluating and reporting unsafe conditions.

5. As an expert witness in this case, I have reviewed the deposition transcript of the plaintiff's deposition, the Charter Party Agreement governing the voyage involved in this accident, attached to the Declaration of Marc Coleman in Opposition to the Motion as Exhibit "A" and a Survey by Cullen Maritime Services, Inc. of the "Jalagopal", performed on October 4, 1989.

Based on my review of the above-mentioned documents, I have ascertained the following facts concerning plaintiff's accident.

A. The vessel "Jalagopal" was owned by defendant Scindia Steam Navigation Company, Ltd. ("Scindia") and chartered to defendant The Shipping Corporation of India, Ltd. ("SCI").

B. According to the pertinent charter party agreement, at paragraph 8, Scindia appointed the Captain who was "under the orders and directions of the charterers as regards employment and agency". Furthermore, charterer SCI assumed the responsibility "to load, stow and trim, secure, lash, unlash, tally and discharge the cargo at their expense under the supervision and responsibility of the Captain".

C. I have been informed that the defendants hired and employed the Captain and crew for the voyage through a management company and that for purposes of this motion, the vessel including both Scindia and SCI concede that the load and stowage of the cargo in the hatch where plaintiff was working was defective in that (a) there was no dunnage or cargo separation between the bundles of pipes; (b) the bundles were dropped haphazardly in the hold in no particular order; and (c) that the covering of the bundles with blue plastic or other wrapping was slippery and dangerous to walk on.

D. Plaintiff and his longshore gang working to discharge the cargo were not able to unload the cargo in a normal manner. Instead, the men had to look for the easiest bundle to discharge wherever it might be in the hatch, take that bundle out and then look for the next easiest bundle to remove. The uneven stowage of pipe created an unsafe walking area that was made slippery by the blue plastic sheet wrapping. The men were aware of this condition, discharged the pipe bundles one at a time as best they could and tried to move away from the load being taken out as quickly and safely as possible attempting to avoid injury.

E. Plaintiff was injured when he was attempting to move away from the load being lifted. He slipped and fell due to the bad footing and slippery surface of the cargo.

6. In addition to what is reflected in the charter party agreement and what has been admitted or conceded by the defendants, it is the custom and practice in the maritime industry that the vessel is responsible for the condition of cargo which is loaded and stowed in foreign ports for discharge here. The vessel, including the owner and charterers, is responsible for presenting its ship and cargo in such condition that a stevedoring company can, with the exercise of reasonable and ordinary care expected of experienced longshore workers discharge the cargo without unreasonable risk of injury to the off-loading longshoremen. Further, the vessel has the responsibility to intervene and correct an improper stowage by the foreign loading stevedores which would foreseeably result in an unreasonable risk of injury to the unloading stevedores *as it is being done.*

7. In my experience, there are at least two normal and customary methods of stowing pipe. The most usual and practical is that the bundles are arranged in layers or tiers with cargo separation between each tier and proper vertical separation called shoring to prevent any shifting of the cargo in the stow. With proper cargo separation, the longshore gangs can wrap choker slings around the bundles and hoist them out. The second method for stowage is a "nested stow" commonly used for loose pipe. In this method, the pipes are stowed uniformly and are generally of the same dimension so that they rest securely on each other, also in layers or rows.

8. In my opinion, the stowage onboard the "Jalagopal" which plaintiff was discharging was an extremely dangerous cargo. Not only was there apparently no cargo separation in the form of shoring nor dunnage separating layers, there was no system or pattern to the stowage whatsoever. The cargo

appeared to have been dumped into the hold without any plans for how it could be discharged.

9. Given the stow encountered by the longshoremen including plaintiff, the only available method of discharge was that which the longshoremen were using. The men were searching for those bundles they could best and most safely remove wherever they might be in the hatch and they were attempting to remove the bundles so that the load across the hatch remained as level as possible. This system was reasonable, necessary and as safe as possible given the condition of the stowage.

10. Plaintiff was injured when he was moving away from a stow being lifted out of the hatch. Moving from a lifting load is a proper procedure during the course of a discharge operation. No longshore worker should be standing in the vicinity of the load being discharged due to the obvious hazards of the load falling, equipment breaking or cargo shifting. It was therefore proper for plaintiff to be moving out of the way as he was just before his accident.

11. It is also my opinion that there is nothing plaintiff or the stevedore company could or should have done to avoid plaintiff's accident. Because the cargo was uneven and in the process of discharge across the hold, it would not have been possible to insert walking boards or other flat surfaces during the discharge operations. Therefore I conclude that neither plaintiff nor his employer were at fault in any way in causing plaintiff's accident.

12. Based on my experience in the maritime industry, the vessel including its owners, charterers and officers should have required the cargo to be loaded in an orderly way with proper stowage and dunnaging. It is established custom and practice in the industry that the Captain is in charge of his vessel and has the power and authority to supervise the loading operations to ensure proper stowage.

The facts in this case indicate that the Captain failed to carry out his responsibility resulting in the cargo being in an unreasonably dangerous condition and ultimately causing injury to plaintiff.

I declare under penalty or perjury that the foregoing is true and correct.

Executed at San Pedro, California this 7th day of October, 1991.

HEINZ W. FRISCH
Heinz W. Frisch